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Crop Destruction and Forward Grain Contracts: Why Don't Sections 2-613 and 2-615 of the U.C.C Provide More Relief?

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CROP DESTRUCTION AND FORWARD GRAIN CONTRACTS: WHY DON'T SECTIONS 2-613 AND 2-615 OF THE U.C.C. PROVIDE MORE RELIEF?

*David C. Bugg**

INTRODUCTION

Forward grain contracting has always been a useful tool to both farmers and grain dealers. In such contracts, a farmer will agree to sell and a grain dealer will agree to buy a certain volume of grain at a set price with delivery to be made in the future. Generally, farmers enter these contracts as economic protection for the crops they raise, because such crops are usually their primary source of annual income. The contract provides protection against future price declines by ensuring that the grain price will at least be sufficient to cover expenses of raising the crop. Protection from inadequate market demand is also assured because the contract provides a market for the farmer's crops when harvested. Conversely, the grain dealer has secured protection from future price increases and shortages of supply.[1]

One element that can wreak havoc on this seemingly adequate protection plan is the farmer's inability to harvest his crops because of their destruction by an act of God or other unanticipated occurrence. The farmer believes that this inability to harvest his crops has extinguished his only possibility of completing the contract. Thus, the farmer seeks relief from his obligation to deliver under the forward grain contract. The grain dealer, however, still needs grain and may have production quotas or supply contracts that must be met. Hopefully, the parties have specifically provided in their contract for the contingency that the farmer will be unable to harvest his crops. When they have not, disputes can and do arise as indicated by the line of cases forming the subject of this paper.

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1. *See* Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 26-27 (1974) for a discussion by the United States Supreme Court concerning the utility of forward grain contracts and their effect on interstate commerce.

A typical example of the disputes that arise is the case of *Semo Grain Co. v. Oliver Farms, Inc.*[2] In *Semo*, the forward grain contract simply provided that the defendant, a farming corporation, was to sell to the plaintiff, a grain dealer, a set volume (75,000 bushels) of a particular type of soybeans (No. 1 Yellow) at a set price ($3.10 per bushel). It did not mention defendant's crops or land, so it obviously did not provide for the parties' obligations if the defendant's crops were destroyed. The contract was entered in March, 1972, delivery was to be made to plaintiff's elevator in January, 1973. The defendant's president testified that 3500 acres of soybeans were planted on farms owned or rented by the defendant. Excessive rainfall destroyed all but 1500 acres of the crop and only 19,855 bushels were harvested. The defendant sold the harvested beans to other grain purchasers at prices in excess of the $3.10 contract price. No soybeans were delivered to plaintiff and plaintiff was not notified of defendant's inability to deliver. The plaintiff was required to "buy in" 75,000 bushels of soybeans to meet its obligation on a resale contract it had entered immediately after the execution of the agreement between plaintiff and defendant.

The plaintiff sued for, and the court awarded damages for, the difference between the contract price and the market price of soybeans as of January, 1973. On appeal, the Missouri Court of Appeals, Springfield District, rejected the defendant's contentions that the contract was rendered impossible to perform under the provisions of Uniform Commercial Code (hereinafter, U.C.C.) section 2-613, or impracticable to perform under the provisions of section 2-615.[3] The Appeals Court held that the defendant farming corporation's performance was not excused because the agreement did not fall within the provisions of sections 2-613 and 2-615 and was not ambiguous in its terms. The court reasoned that since the beans were not identified other than by kind and amount, the defendant could still fulfill its contractual obliga-

2. 530 S.W.2d 256 (Mo. Ct. App. 1975).

3. Several weeks after all the evidence was presented and the case was in the bosom of the trial court, the defendant sought a motion to amend its answer to allege that it was excused from performing pursuant to §§ 2-613 and 2-615 of the Uniform Commercial Code due to adverse weather conditions. The trial court denied this motion, and therefore the applicability of §§ 2-613 and 2-615 was never addressed at trial. The Missouri Court of Appeals affirmed the trial court's denial of the defendant's motion to amend. However, the Appeals court addressed the issue of excused performance under §§ 2-613 and 2-615 without explaining its compulsion to do so. It can not be determined whether this procedural error by the defendant influenced the Appeals Court's analysis of §§ 2-613 and 2-615. However, it should be noted that the Appeals Court could not reverse the decision based on its analysis of §§ 2-613 and 2-615 since these issues were never properly before the trial court and were not the basis of the holding.

tion by acquiring beans from any other place or source.

The issue presented by the *Semo* case, and the subject of this paper, is when sections 2-613 and 2-615 will operate to excuse a farmer's performance under a forward grain contract if the farmer's crops can not be harvested due to circumstances beyond his or her control. Adequate discussion of this issue requires analysis of the text and comments of sections 2-613 and 2-615, their common law underpinnings, and the cases in which forward grain contracts and sections 2-613 and 2-615 of the U.C.C. are at issue.

Applicable Principles of Law

Section 2-613. Casualty to Identified Goods

Section 2-613 of the U.C.C. entitled "Casualty to Identified Goods" allows the parties to avoid a contract where the goods that form the basis of the contract are destroyed or damaged. The text of the section states:

> Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a 'no arrival, no sale' term (section 2-324) then
> (a) if the loss is total the contract is avoided; and
> (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

The authorities[4] seem to be in general agreement that three conditions are contained in the provisions of section 2-613. These conditions must occur before a party can be excused from his duty to perform. They include: (1) goods must be identified when the contract is made, (2) casualty to the goods is not the fault of either party and (3) the risk of loss must not have been passed to the buyer. In the context of forward grain contracts, satisfaction of the second and third conditions poses no great problems. However, determining what constitutes "iden-

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4. *See* 4 R. Anderson, Uniform Commercial Code, § 2-613:3, at 257 (1983) [hereinafter Anderson]; 3 W. Hawkland, Uniform Commercial Code Series, § 2-613:01, at 153 (1984) [hereinafter Hawkland].

tification" to satisfy the first condition remains an enigma.

As in all problems concerning proper construction of the terms of the U.C.C.,[5] the comments to section 2-613 should be the first source of assistance. Comment 1 states "[w]here goods whose continued existence is presupposed by the agreement are destroyed without fault of either party, the buyer is relieved from his obligation . . . ." This comment is a restatement of the textual provisions of section 2-613. Therefore, "goods identified when the contract is made" is restated by the comment as "goods whose continued existence is presupposed by the agreement." Replacing the word "agreement" with its definition from the U.C.C.[6] and the word "presupposed" with its definition from the dictionary,[7] the phrase from Comment 1 could again be restated as "goods whose continued existence is taken for granted by the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act . . . ." Thus, according to this interpretation, the intent of the parties must be ascertained to determine whether goods are identified to the contract.

Comment 2 does not contradict, but affirms the above analysis by stating in part: "Beyond this, the essential question in determining whether the rules of this section are to be applied is whether the seller has or has not undertaken the responsibility for the continued existence of the goods in proper condition through the time of agreed or expected delivery." To summarize the proper construction of section 2-613 according to the comments, the intent of the parties must be ascertained in order to determine if the goods have been identified to the contract, unless the seller has expressly assumed the risk of continued existence of the goods.

A second source in determining proper construction of "identification" is definitions of the term provided by the U.C.C. section 2-103,

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5. U.C.C. General Comment of National Conference of Commissioners of Uniform State Laws and the American Law Institute (1978) states:

> Uniformity throughout the American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction of this Comment and those which follow the text of each section set forth [sic] the purpose of various provisions of this Act to promote unifromity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.

6. "Agreement" is defined as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act . . . ." U.C.C. § 1-201 (1987).

7. "Presuppose" is defined in part as "to suppose beforehand: form an opinion or judgment of in advance." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabr. 1981).

entitled "Definition and Index to Definitions," which indicates that "identification" is defined in section 2-501.

Section 2-501,[8] entitled "Insurable Interest in Goods; Manner of Identification of Goods," does not specifically define what constitutes identification. It states that "identification can be made . . . in any manner explicitly agreed to by the parties . . . ."[9] From the forward grain contract issue of this paper, it is obvious that both parties do not agree that they have reached explicit agreement concerning identification of the farmer's crops to the contract. Section 2-501(1) further provides:

> In the absence of explicit agreement identification occurs . . .
>
> (c) when the crops are planted or otherwise become growing crops . . . if the contract is for the sale of crops to be harvested within twelve months of the next normal harvest season after contracting whichever is longer.

Based on the language of this subsection, an "explicit agreement" is not absolutely necessary for identification to occur. If an "explicit agreement" is not absolutely necessary, then identification can be made "in any manner." Therefore, it is possible that a farmer contracting to sell grain has identified his crops to the contract. This result, however, is not conclusively established.

The comments to section 2-501 also do not clarify the identifica-

8. U.C.C. § 2-501(1) provides:

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

9. Comment 3 to U.C.C. § 2-501 clarifies and gives an example of an "explicit agreement:" An explicit agreement, however, need not necessarily be found in the terms used in the particular transaction. Thus, where a usage of trade has previously been made explicit by reduction to a standard set of "rules and regulations" currently incorporated by reference into the contracts of the parties, a relevant provision of those "rules and regulations" is "explicit" within the meaning of this section.

tion of crops to forward grain contracts, but may establish that reference to section 2-501 is inapposite in this context. Comment 2 to section 2-501 states that "the general policy is to resolve all doubts in favor of identification." However, that statement is qualified by the introductory phrase, "[i]n view of the limited effect given to identification by this Article . . . ." Also, comment 1 to section 2-501 states that "[t]he present section deals with the manner of identifying goods to the contract so that an insurable interest in the buyer and the rights set forth in the next section will accrue . . . ." Apparently, section 2-501 has limited applicability that does not extend to sections 2-613 and 2-615.

From the foregoing, section 2-501 would seem to allow a farmer and a grain dealer to utilize "any manner" to identify the farmer's crops to a forward grain contract. It also appears, however, that the provisions of section 2-501 are inapplicable to sections 2-613 and 2-615. "Identification" is not defined in any other provisions of the U.C.C.

The final source to be used in determining the proper construction of "identification" is the common law upon which section 2-613 developed. The basic maxim of contract law is *pacta sunt servanda*, the agreement of the parties must be observed.[10] This maxim is based on the theory that a party who has consensually created an obligation upon himself is bound to make it good regardless of collateral circumstances because he could have provided for such.[11] However, as is the case with any absolute rule, there must be exceptions.

The early exceptions to the strict rule that contracts must be observed were based on circumstances that rendered performance impossible, such as illegality of the required performance,[12] death of one of the parties[13] or destruction of a particular thing necessary for performance.[14] This last exception is deemed to be the foundation of section 2-613.

Whether section 2-613 has further developed from this common law rule that serves as its underpinning is not clear. Professor Hawkland states that section 2-613 maintains the principal element of the doctrine of impossibility through the requirement that the goods be

10. RESTATEMENT (SECOND) OF CONTRACTS, Chapter 11, at 309 (1982) (Introductory Note).

11. *See* E. FARNSWORTH, CONTRACTS, § 9.5, at 670-71 (1982) [hereinafter FARNSWORTH].

12. *Id.* at 671.

13. *Id.* at 672.

14. *Id.* at 673.

identified when the contract is made. He uses crop failures to illustrate the application of this requirement in excusing performance. A farmer who promises to deliver the very crop that was destroyed is excused from performing because the contract requires the existence of a specific thing that was fortuitously destroyed. However, a farmer who promises to deliver 10,000 bushels of a crop is not excused. Even though continued existence of the crops from the farmer's land is extremely important to him, it is not absolutely necessary for the performance of the contract because the farmer can acquire the crops from someone else.[15] Seemingly, Professor Hawkland has deduced that section 2-613 is the unembellished codification of the common law doctrine of impossibility.[16]

Professor Farnsworth states that section 2-613 deals with a situation that is a clear case of whether a particular thing is necessary for performance.[17] His example of a clear case is *Taylor v. Caldwell*,[18] the impossibility case decided in 1863 that excused performance of a concert because the music hall was destroyed by fire. Section 2-613 is not discussed in Farnsworth's "new synthesis" concerning development of the common law and impracticability in which section 2-615 is discussed.[19] Also, White and Summers do not even discuss section 2-613 in their discussion of the development of excuse, impracticability and the like.[20]

The implication that can be drawn from these commentators' analyses is that section 2-613 has not developed and is still based on the common law rule of strict impossibility. This position might be justified by arguing that the doctrine of impossibility can not develop further because a contract is impossible only if the specific subject matter of the contract is destroyed. The problem with discussing section 2-613 from this frame of reference, however, is that the test for excuse often focuses on whether the subject of the contract is impossible rather than

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15. HAWKLAND, *supra* note 4, § 2-613:02, at 153-54.

16. Professor Hawkland's deduction loses persuasiveness, however, in his explanation of a previous modification in the language of § 2-613. He terms the modification of the 1952 version of § 2-613 from "casualty to unique goods" to "casualty to identified goods" as "obviously . . . one of style rather than substance." The rationale for the modification was the potential for the word "unique" to be used in a very restrictive manner. Freeing § 2-613 from the strictures of the word "unique" would seem to be more than a mere modification in "style." *Id.* at 155-56.

17. FARNSWORTH, *supra* note 11, § 9.5, at 673.

18. 122 Eng. Rep. 309 (K.B. 1863).

19. FARNSWORTH, *supra* note 11, § 9.6, at 677.

20. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE, § 3-9, at 127-36 (2d ed. 1980) [hereinafter WHITE & SUMMERS].

whether the subject of the contract has been destroyed. Contracts concerning fungible goods are never truly impossible to perform. Thus, focusing on the impossibility of the contract would preclude a fungible goods contract from being excused even if the parties identify a particular group or lot of goods.

The Restatement (Second) of Contracts, section 263,[21] provides a different view of the common law development behind section 2-613. It discusses destruction of the subject of the contract in terms of impracticability and basic assumptions of the parties. This focuses the test for excuse on the parties' intent concerning the subject matter of the contract rather than on the impossibility of the contract. Thus, fungible goods contracts can fall within its provisions. Comment b to the Restatement (Second) of Contracts, section 263, further clarifies this position:

> The rule stated in this Section applies not only when the terms of the contract make the specific thing necessary, but also when, although the contract is silent, the parties understand that it is necessary. In proving such an understanding, prior negotiations may be used to show the meaning of a writing, even though it takes the form of a completely integrated agreement.[22]

Section 2-613 is closely related to section 263 of the Restatement (Second) because both sections deal with the existence and destruction of specific goods.[23] Section 2-615 of the U.C.C. and section 261 of the Restatement (Second) deal with the occurrence of contingencies other than the existence and destruction of specific goods.[24] The distinction

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21. RESTATEMENT (SECOND) OF CONTRACTS § 263 (1982) concerning Destruction, Deterioration or Failure to Come into Existence of Thing Necessary for Performance, provides that "[i]f the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made."

22. *See also id.*, comment b, illustration 7 at 330 which states:

> A, a farmer, contracts with B in the spring to sell a large quantity of beans to B during the following season. Although the contract does not state where the beans are to be grown, A owns but one tract of land, on which he has in the past raised beans, and both parties understand that the beans will be raised on the tract. A properly plants and cultivates beans on the tract in sufficient quantity to perform the contract, but an extraordinary flood destroys the crop. A delivers no beans to B. A's duty to deliver beans is discharged, and A is not liable to B for breach of contract. Compare Illustration 1 to this Section; Illustration 12 to section 261.

23. *See also id.*, Reporter's Note which cites the authority for § 263 and refers to U.C.C. § 2-613 but not to § 2-615 or to other U.C.C. sections.

24. U.C.C. § 2-615 comment 1 (1987) implies that this is the proper criteria for distinguishing §§ 2-613 and 2-615 by stating, "[t]he destruction of specific goods . . . treated elsewhere in this Article, must be distinguished from the matter covered by this section . . . ." *See also*

between sections 2-613 and 2-615 is that section 2-613 encompasses "impossibility" while section 2-615 encompasses "impracticability."

Section 2-613 does not discuss destruction of the subject of the contract in terms of impracticability and basic assumptions of the parties as does section 263 of the Restatement (Second). It also does not require absolute impossibility of performance before the contract can be avoided. If the terms "impracticability" and "basic assumption of the parties" were included in section 2-613, the confusion concerning its applicability would be greatly reduced. Nevertheless, courts are not precluded from interpreting the actual text of section 2-613 to have the same effect as if these terms were included.

While the common law development of section 2-613 is not entirely clear, the more fully developed rationale of the Restatement (Second) of Contracts indicates that the parties' intent must be determined concerning identification of the goods. Such rationale accords with this author's analysis of the text and comments to section 2-613. Also, the standards to determine avoidance under section 2-613 should be substantially similar to those used to determine excuse under section 2-615 since the only factor used to distinguish the sections is the contingencies to which they apply.

Section 2-615. Excuse by Failure of Presupposed Conditions

Section 2-615 entitled "Excuse by Failure of Presupposed Conditions" excuses performance under a contract for sale when certain contingencies occur that render the contract commercially impracticable to perform. Text of the section states:

> Except so far as a seller may have assumed a greatere obligation and subject to the preceding section on substituted performance:
>
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the sellers capacity to perform, he must allocate production

RESTATEMENT (SECOND) OF CONTRACTS § 261 (1982), Reporter's Note which cites authority for § 263 and primarily refers to U.C.C. § 2-615.

> and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may also allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under this paragraph (b), of the estimated quota thus made available for the buyer.

There is general agreement that three conditions must be met in order for performance to be excused under section 2-615.[25] One, the contingency must have made performance impracticable; two, the nonoccurrence of the contingency was a basic assumption on which the contract was made; and three, the party seeking excuse must not have assumed the risk of occurrence of the contingency. A fourth condition, often omitted because of its obviousness, is that the impracticability must have resulted through no fault of the party seeking excuse.[26] Unlike the conditions imposed by 2-613, all conditions of 2-615 pose problems in determining whether performance of a forward grain contract can be excused.

Again, the first source to consider in resolving problems concerning construction of section 2-615 are the comments of the National Conference of Commissioners. Comment 1 states, "[t]his section excuses a seller from timely delivery of goods contracted for, where his performance has been commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of the contracting." Comment 8 contains a similar concept by stating:

> [T]he exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as a part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances . . . .

These comments imply that occurrence of the contingency must not be foreseen, not contemplated, or not sufficiently foreshadowed by the parties during execution of the contract. Thus, condition two, the non-occurrence of the contingency was a basic assumption on which the con-

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25. *See* ANDERSON, *supra* note 4, § 2-615:13, at 274-75; FARNSWORTH, *supra* note 11, § 9.6, at 678; HAWKLAND, *supra* note 4, § 2-615:06, at 194-95; WHITE & SUMMERS, *supra* note 20, at 129.

26. FARNSWORTH, *supra* note 11, § 9.6, at 678.

tract was made, would seem to be more restrictive and difficult to satisfy because of this "foreseeability" requirement added by the comments. Comment 4 eliminates this added requirement in the context of forward grain contracts, however, by stating, "[b]ut a severe shortage of raw materials or of supplies due to a contingency such as . . . local crop failure . . . which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section." This disparity between section 2-615 text and the comments concerning the required conditions for excuse is troublesome.[27]

Another discrepancy arises between comments 5 and 9 to section 2-615. Comment 5 can be paraphrased as stating where a particular source of supply is exclusive under the agreement or is contemplated or assumed by the parties at the time of contracting and fails through casualty, section 2-615 applies rather than section 2-613. Crops grown on designated land are a source of supply,[28] therefore, comment 5 infers that section 2-613 is not applicable to crop failure cases. Comment 9, however, basically states that farmers can be excused under either section 2-613 or section 2-615 for both failure of crops grown on designated land and failure of specific crops. It may not matter which interpretation is truly correct because a contract can only be excused once. Another source of confusion, however, is added to an area that is already confusing enough.[29]

Further analysis of the comments to section 2-615 reveals that comment 9 includes such terms as crops to be grown on "designated"

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27. *See infra* notes 30-33 and accompanying text.

28. U.C.C. § 2-615 comment 4 (1987) establishes that the U.C.C. considers crops to be a source of supply by including them in the list designating examples of sources of supply.

29. White & Summers, *supra* note 20, § 3-9, at 127 states:

> The Doctrines of Impossibility, Commercial Impracticability or as the Uniform Commercial Code knows it, Excuse by Failure of Presupposed Conditions comprise one of the unclimbed peaks of contract doctrine. Nearly all of the famous early and mid-twentieth century mountaineers, Corbin, Williston, Farnsworth, and many lesser men have made attempts on this topic but none have succeeded in climbing it to the very top. The topic inheres in § 2-615 of the U.C.C., in §§ 454-469 of the Restatement of Contracts and in series of Anglo-American cases. In spite of attempts by all of the contract buffs and even in the face of eloquent and persuasive general statements, it remains impossible to predict with accuracy how the law will apply to a variety of common cases. Both the cases and the Code commentary are full of weasel words such as 'severe' shortage, 'marked' increase, 'basic' assumptions, and so on. Any one who has concluded his first year contracts course in confusion about the doctrine of impossibility and has since found that the cases somehow slip through his fingers when he tries to apply them to new situations, may take modest comfort in knowing he is in good company.

land and "specific" crops. Comment 9 also uses the term "contract" rather than "agreement" when discussing designated land and specific crops. This might imply that the land or the crops must be "identified" in the contract, otherwise, section 2-165 will not excuse performance. However, by definition a contract[30] results from the parties' agreement. The definition of agreement[31] can be paraphrased as the bargain intended by the parties. Therefore, the parties' intent can be used to determine terms of the agreement whether or not land was designated or crops specified in the contract. Also, if designated land constitutes a source of supply,[32] comment 5 provides that the parties' contemplations and assumptions concerning the source of supply, and not just specific contract terms, will satisfy the conditions of section 2-615.

In summary, the comments to section 2-615 indicate three insights concerning proper construction of terms. First, foreseeability is a consideration in determining if the contingency was a basic assumption of the parties. The fact that the contingency is foreseeable, however, does not preclude the applicability of section 2-615, at least in the case of local crop failure. Second, both sections 2-613 and 2-615 are applicable to local crop failures even though crops are considered a "source of supply" which is exclusively within the scope of section 2-615. Third, in determining whether land is "designated" or crops are "specified" in the contract, the parties' agreement or intended bargain, rather than specific contract terms, should control.

The second source used to aid in construction of the sections, definitions of terms provided by the U.C.C., is not helpful in construction of section 2-615 as it was with section 2-613. None of the key terms in section 2-615, such as impracticable, contingency, or basic assumption, are defined by the U.C.C.

The third source to aid in construction of the terms of section 2-615 is the common law from which it developed. Section 2-615 clearly evolved from the legal doctrines of impossibility, frustration of purpose, and implied conditions. The rule of impossibility is that if the existence of a particular thing is necessary for a party's performance, the party is excused if the destruction or deterioration of that thing prevents performance.[33] Frustration of purpose can be used where one party to a

30. U.C.C. § 1-201(11) (1987) provides: "Contract" means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law. (Compare "Agreement").

31. *See supra* note 6.

32. *See supra* note 28.

33. FARNSWORTH, *supra* note 11, § 9.5, at 673 (citing RESTATEMENT (SECOND) OF CON-

contract has been entirely deprived of the benefit he expected from the other's performance.[34] The doctrine of implied conditions was used by the courts to supply a term of the contract by implication in order to effectuate the doctrines of impossibility and frustration of purpose.[35]

The doctrines of impossibility, frustration of purpose, and implied conditions were exceptions in *Paradine v. Jane*;[36] therefore, they were originally given narrow construction. Development of the common law resulted in freeing these doctrines from fictional and unrealistic strictures. This development was synthesized in section 2-615 which candidly recognizes that the judicial function is to determine whether, in the light of exceptional circumstances, justice requires a departure from the general rule that a promisor bears the risk of increased difficulty of performance.[37]

Hawkland[38] found further evidence of the increased leniency with which section 2-615 is to be applied in the private notes of Professor Llwewellyn. He states that Professor Llewellyn had two things in mind in drafting section 2-615. First, he wanted to free force majeure clauses from restrictive constructions that had deprived them of their commercial utility in some pre-Code states.[39] Second, he wanted to provide a general doctrine of excuse to replace the concepts of frustration and implied condition and to operate in appropriate circumstances even

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TRACTS § 263 (1982)). Professor Farnsworth illustrates the doctrine of impossibility with the case of Taylor v. Caldwell, *supra* note 18, which held that destruction by fire of a music hall rendered a contract for musical performances at the music hall impossible. Thus, the music hall owner was relieved of liability for any damages suffered by the musician.

34. *See* FARNSWORTH, *supra* note 11, § 9.6, at 690. Professor Farnsworth illustrates the doctrine of frustration of purpose with the case of Krell v. Henry, 2 K.B. 740 (1903) which held that cancellation of the King's coronation due to the King's illness relieved the lessee from liability on a contract to rent an apartment because the sole purpose for renting the apartment was to view the King's coronation.

35. *See* FARNSWORTH, *supra* note 11, § 8.2, at 539; *see also* HAWKLAND, *supra* note 4, § 2-615:01, at 178.

36. 82 Eng. Rep. 897 (Aleyn, 26, 1647).

37. *See* FARNSWORTH, *supra* note 11, at 677-78; *see also* RESTATEMENT (SECOND) OF CONTRACTS, Chapter 11 Introductory Note at 310 (1982).

38. HAWKLAND, *supra* note 4, § 2-615:01, at 181.

39. *Id.* at 180-81. Three limitations the courts used to restrict the utility of force majeure clauses:

> First, the courts held that the excusing contingencies must have been stated with some particularity . . . . In addition . . . [t]hese courts held that a contingency, although specifically listed or falling within the residual clause of the exemption term, excused performance only where it actually caused the delay or nonperformance through its occurrence . . . . Finally, some courts narrowed the exemption stated in the force majeure clause by construing the clause most strongly against the party drawing it, who, as a practical matter is usually the seller.

where no exemption clause appears in the contract. The Restatement (Second) of Contracts also propounds the leniency with which to apply section 2-615. It provides: "This Restatement rejects this analysis [the rationale behind the doctrines of impossibility, frustration and impled conditions] in favor of that of the Uniform Commercial Code section 2-615, under which the central inquiry is whether the non-occurrence of the circumstance was a basic assumption on which the contract was made."[40]

Development of the law in determining whether the non-occurrence of a particular event was or was not a basic assumption of the parties involves a judgment as to which party assumed the risk of its occurrence.[41] All circumstances surrounding the contract should be considered, including: (1) the terms of the contract, (2) the foreseeability of the event,[42] (3) the relative bargaining position of the parties, (4) the relative ease with which either party could have included a clause, and (5) the parties ability to spread such risks in the market.[43] Under this rationale, a party should be relieved from his obligation when the contract was made on a different basic assumption from the one that has arisen. Courts should utilize all available information concerning circumstances surrounding the contract to determine if this different basic assumption has arisen.

This analysis of the common law development of section 2-615 is substantially similar to the analysis gleaned from the comments to section 2-615. In each, the focus should be on all circumstances surrounding the contract. Contract terms and foreseeability of the contingency are considerations, but without express terms dealing with the specific contingency, other factors must be considered in determining whether excused performance is warranted.

THE ANALYSIS BY THE COURTS

Courts have struggled to apply sections 2-613 and 2-615 to forward grain contract cases. The cases that follow illustrate that the courts have ignored the requirements of these two sections. They have strictly construed a farmer's promise to deliver "grain" as meaning that

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40. RESTATEMENT (SECOND) OF CONTRACTS, Chapter 11 Introductory Note at 310-11 (1982).

41. *Id.* at 311.

42. The RESTATEMENT states: "However, the fact that it was foreseeable, or even foreseen, does not, of itself argue for a contrary conclusion, since the parties may not have thought it sufficiently important a risk to have made it a subject of their bargaining." *Id.*

43. *Id.*

the farmer's "crops" are not the subject of the contract, thereby denying excused performance. Alternatively, they have held the parol evidence doctrine to be inapplicable. Thus, the farmer's oral evidence is allowed to prove his "crops" are the subject of the contract, thereby excusing his performance. The following is a summary of decisions listed in the U.C.C. Reporting Service concerning forward grain contracts.

In *Semo*,[44] the court did not excuse the farming corporation's performance under sections 2-613 and 2-615. Apparently, the court interpreted sections 2-613 and 2-615 as requiring express identification of the farmer's land or the specific crop or both before performance could be excused. The contract did not identify the land or the crop and the court rested its decision on that fact alone. No further analysis of sections 2-613 and 2-615 or of the circumstances surrounding the contract was undertaken.

Other factors probably influenced the court to hold as it did. The following are examples of those factors and the reasons they influenced the court. The defendant was a farming corporation rather than a farmer. Corporations typically do not get sympathetic treatment from courts. Also, the defendant sold to others at prices in excess of the contract price those soybeans that were produced. This was done without notifying the plaintiff of the inability of the defendant to perform. Thus, it could be perceived that the defendant was the culpable party by trying to abrogate the contract rather than perform to the extent possible. Additionally, sections 2-613 and 2-615 were not even raised as defenses by the farmer at trial.[45]

In analyzing the applicability of section 2-613, the *Semo* court should have considered the fact that the farmer's crops were not precluded from being the goods identified to the contract and explained why a farmer and grain dealer would not consider the farmer's crops to be identified to a contract that called for delivery during the harvest season. In analyzing the applicability of section 2-615, the *Semo* court could have determined whether performance was impracticable, whether non-occurrence of the loss of the defendant's crops was a basic assumption of the contract and whether the defendant had assumed the risk of performing the contract despite the loss of his crops. This analysis could have resulted in the same decision, but at least the court would not have to rest on the premise that the farmer's crops were not

44. 530 S.W.2d 256 (Mo. Ct. App. 1975).

45. *See supra* note 3.

the subject of the contract because the contract simply provided for a quality and quantity of grain. Under the above analysis, if the court determined that the farmer's crops were intended to be the subject of the contract it could still address and redress the other problems that influenced its decision.

Section 2-613(b) provides relief for the buyer when the contract can only be partially performed as was the case in *Semo*. It allows the buyer the right to inspect the partial performance and gives him the option of avoiding the contract or accepting the partial performance with due allowance from the contract. Section 2-615(b) and (c) also provide relief for the buyer by prescribing additional requirements for the seller, performance to the extent possible and notice to the buyer of the inability to perform. The buyer in *Semo* was not given the right to inspect and was not given notice of the inability of the farmer to perform. The farmer did not perform to the extent possible. The court could have reached the same result by holding that the provisions of 2-613 and 2-615 were not applicable since the farmer did not comply with the necessary requirements of those sections. However, the court could also have utilized section 2-613 or 2-615 to award the buyer damages for the quantity of soybeans that could have been delivered and to excuse the defendant for the quantity of crops destroyed by an act of God. Such a holding would seem equitable considering the circumstances.

The principle citation of authority by the *Semo* court was *Bunge v. Recker*.[46] In *Recker*, the facts were almost identical to those in *Semo*. The defendant-farmer contracted to deliver ten thousand bushels of No. 2 yellow soybeans at $3.35 per bushel to plaintiff-grain dealer's place of business in January, 1973. The contract did not specify that the beans were to be grown on the farmer's land. It also did not specify that the contract would be performed regardless of the status of the farmer's crops. The only difference from the *Semo* case was that the contract contained a clause:

> 9. Seller warrants that the commodity delivered under this contract was grown within the boundry (sic) of the continental United States.

The contract in question was one of a series between the farmer and the grain dealer. The farmer delivered approximately 12,000 bushels of soybeans during November and December, 1972. About 4,700

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46. 519 F.2d 449 (8th Cir. 1975). *Recker* was a Missouri case decided by the Eighth Circuit. The Missouri Supreme Court used it as precedent in *Semo*.

bushels were delivered and sold at prices higher than the contract price during January, 1973.[47] Thereafter, severe winter weather struck the area in early January making it impossible for the farmer to harvest approximately 865 acres of his beans. He was unable to deliver any beans under the subject contract.

The grain dealer sued for damages for breach of contract. The farmer defended under section 2-613 that his performance was excused by reason of an act of God in the destruction of part of his crop. The trial court and the Eighth Circuit Court of Appeals rejected the farmer's defense. Since the beans were not identified other than by kind and amount in the contract, the courts held that the farmer's crops had not been adequately identified to meet the requirements of section 2-613. The court also held that because of clause 9 in the contract, introduction of parol evidence to show that the beans were to be grown on a particular acreage would completely circumvent the provisions of section 2-202.[48]

Identification of the farmer's crops to the contract and the applicability of section 2-613 would have been difficult to establish in light of the contract clause noted above. The clause, however, may not have precluded the applicability of section 2-615. In considering the impracticability of performance, the basic assumptions concerning the farmer's crops and the risk assumed by the farmer, the *Recker* court would have to consider several things, such as how a seller obtaining beans in the open market could warrant that they were grown in the United States, whether clause 9 was boilerplate language in the form

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47. It is not clear from the facts of the case which, if any, of the deliveries were made to the grain dealer on previous contracts in the series. It appears the January deliveries were made to other dealers, otherwise, the price for those deliveries most likely would have been about the same as the contract at issue. If the farmer delivered to other sources to get the higher prices rather than trying to fulfill his contract with the plaintiff grain dealer, then he would again be perceived as the culpable party trying to abrogate an unfavorable contract.

48. U.C.C. § 2-202 (1987). Final Written Expression: Parol or Extrinsic Evidence:

> Terms with respect to which confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade (§ 2-205) or by course of performance (§ 2-208); and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The *Recker* court may have misapplied the terms of § 2-202 by not allowing course of dealing and/or usage of trade to be used to explain the unusual contract term.

contract, whether the clause was meant to control quality of the soybeans[49] rather than the method of performance, whether the farmer had previously purchased beans to fulfill the contract and why a farmer who planned to purchase soybeans from any place or source would contract for delivery in January, the harvest season. The apparent lack of culpability of the farmer,[50] as opposed to *Semo*, makes this holding seem harsh. The court could have better explained its holding by analyzing and discussing the provisions of sections 2-613 and 2-615 rather than again resting on vague contract terms.

In *Bunge v. Miller*,[51] the defendant-farmer contacted the plaintiff-grain dealer, seeking to contract for the sale of soybeans. Eventually, the plaintiff sent the defendant two contracts for the sale by the defendant of 10,000 bushels of soybeans for October and November delivery which the defendant signed and returned. The defendant made small deliveries in October, November and January. However, he was unable to deliver the 8,300 bushel balance due on the contract because of unusually heavy rains and flooding.

The court first noted that the defendant was relying on section 2-615, "which covers the general doctrine of impossibility to excuse his performance."[52] It then cites Anderson[53] for the test to determine applicability of 2-615 in crop failure cases: "if both parties contemplated fulfillment of the contract by a particular crop."[54] The evidence proved that plaintiff's agent assumed the defendant would fulfill the contract from crops he controlled. The court noted that the defendant raised some crops on his own land, some on land rented on a crop share basis and some on land owned jointly by the defendant and his brother. The court held that the defense of impossibility was unavailable to the defendant because the plaintiff had not contemplated that the crops would be filled by beans from a particular crop.

The *Miller* court clearly confused sections 2-613 and 2-615. It discussed section 2-615 in terms of impossibility rather than impracticability. It also used the rationale in section 2-613 by determining the intent of the parties concerning identification of the farmer's crops. The court used a very narrow interpretation of the term "particular crop"

49. The clause may have been included to insure the quality of the beans. For example, to insure that the beans were not grown in a foreign country which did not regulate the use of pesticides.

50. *But see supra* note 47.

51. 381 F. Supp. 176 (W.D. Tenn. 1974).

52. *Id.* at 181.

53. 2 ANDERSON U.C.C. § 2-615:21. *See supra* note 4 at §§ 2-615:21.

54. *Id.*

in finding that the plaintiff did not know from which of the farmer's lands the soybeans would come. If the court had analyzed the commercial impracticability aspect of the contract the result would have been different. It was a basic assumption of both parties that the farmer would fulfill the contract from the crops he controlled. It would be difficult to find that the contract was not commercially impracticable since the rest of the farmer's crops had been destroyed.

In *Ralston Purina Co. v. McNabb*,[55] the plaintiff-grain dealer sued the defendant-farmer for breach of two forward grain contracts. Both were entered into in early September, 1972 and called for delivery during November. One contract was for 5,000 bushels of soybeans at $3.33 per bushel, the other was for 3,000 bushels at $3.29 per bushel. The contracts incorporated by reference the rules of the Grain & Feed Dealers National Association. The parties stipulated that there was unusually heavy rains and flooding during the fall and winter in the areas where the defendant conducted his farming operations. The defendant made deliveries through February, 1973 under contract extension letters executed by the plaintiff. However, the contracts were still underdelivered by 3,771 bushels.

The defendant contended that the severe weather made performance of his contract impossible pursuant to section 2-615. In a very cursory opinion, the court held that the defense of impossibility was unavailable to the defendant since there had been no showing that the contract was to sell a crop from specified land. The court cited *Bunge v. Miller*,[56] comment 9 to section 2-615 and 4 Anderson, U.C.C. section 2-615:21 as authority for this holding.

It is not clear whether the court relied on contract terms or actually tried to determine the basic assumption of the parties since the opinion stated that there had been no "showing" that the contract was to sell a crop from specified land. The court did err in discussing section 2-615 in terms of impossibility rather impracticability. Using a more complete analysis of section 2-615 may have resulted in the same decision in this case. From the facts given, however, this seems to be the exact situation in which section 2-615 is to operate. It would be interesting to know what effect the rules of the Grain & Feed Dealers National Association had on the contract terms and the obligations of the parties.[57]

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55. 381 F. Supp. 181 (W.D. Tenn. 1974).

56. 381 F. Supp. 176 (W.D. Tenn. 1974).

57. By incorporating the rules of the Grain & Feed Dealers Association in the contract by reference, such rules became the "explicit agreement" of the parties. U.C.C. § 2-501 comment 3

In *Ralston Purina Co. v. Rooker*,[58] two farmers, the defendants, contracted to deliver 4,500 bushels of No. 1 yellow soybeans at $3.33 per bushel during October and November. The farmers agreed to the sale in a telephone conversation with the plaintiff-grain dealer. The plaintiff prepared a written contract entitled "Confirmation of Purchase" and mailed it to the defendants who signed it and returned it to plaintiff. A pertinent clause in the contract stated: "Wire us immediately if any error or omission in this contract. Failure to do so constitutes acceptance of all terms thereof."[59]

Due to unprecedented rain and flooding during the harvesting season, the defendants were only able to deliver two loads of soybeans totaling 609 bushels. Plaintiff sued for breach of contract on the undelivered balance of 3,891 bushels. The defendants claimed the agreement was for soybeans actually grown on their farm and that their performance was rendered impossible.

The *Rooker* court utilized the parol evidence rule, section 2-202,[60] to preclude the introduction of parol evidence and thus to preclude excused performance. The court distinguished the *Paymaster*[61] court's holding that the parties did not intend the contract to be a final expression of their agreement because the *Paymaster* contract stated "[w]e confirm . . . as per our conversation."[62] Because there was no such language in the *Rooker* contract and because of the contract term stated above, the *Rooker* court held that the terms of the written contract were intended as the exclusive statement of the agreement of the parties. Since the contract did not specify a particular crop from particular land, the court held there was no basis for the defense of impossibility.

In addition to muddling the determination of the parties intent as it applies to section 2-202, the *Rooker* court also failed to properly analyze and apply section 2-615. Section 2-615 does not require all the basic assumptions of the parties to be specified in the contract. If it did, the farmer would have to perform the contract or answer in damages even if the Russians took over the state of Mississippi and confiscated all the crops for the Kremlin. The U.C.C. was not intended to be harsh and inflexible.[63] Furthermore, a contract for the sale and purchase of

(1987). *See supra* note 9. If these rules contained guidelines for allocation of risk when the farmer's crops are destroyed, it could have been determinative of the case.

58. 346 So.2d 901 (Miss. 1977).

59. *Id.* at 902.

60. U.C.C. § 2-202 (1987), *supra* note 48.

61. Paymaster Oil Mill Co. v. Mitchell, 319 So.2d 652 (Miss. 1975).

62. *Id.* at 657-58.

63. *See, e.g.*, U.C.C. § 1-102 (1987).

grain in which one of the parties is a farmer growing that type of grain as crops should not be considered a final written expression of the agreement without a clause that explains the obligation of the parties if the farmer's crops are destroyed.

The fact that crops were not identified to the contract has worked to the seller's (but not the farmer's) advantage. In *Dreyfus Co. v. Royster Co.*,[64] a written contract was entered on February 15, 1978, to purchase and sell 5,000 bushels of Arkansas Certified Bragg soybeans at $13.50 per bushel F.O.B. Parkin, Arkansas, subject to final certification of the beans. A March delivery was contemplated. The plaintiff was the seller under the contract, but was a middleman or grain dealer rather than a farmer. The defendant was the buyer and was also a grain dealer.[65] On the day the contract was entered, the seller told the buyer he intended to acquire the beans from a company in Parkin, Arkansas. The seller also told the buyer he would be notified when the soybeans had been certified pursuant to the terms of the contract.

The seller and buyer had numerous contacts in the interim and on May 8, it was learned that the beans the seller intended to use to fill the contract might have failed certification. On May 9, the seller confirmed that the beans had failed certification and advised the buyer that he could locate other soybeans. The buyer indicated he did not think he needed the beans any longer. Later that day, the seller purchased other soybeans and tendered them to the buyer. The buyer refused to accept delivery since he had obtained soybeans from another source during the interim between the two phone calls that day. The seller attempted to mitigate his damages and sold the beans for $6.83.

The seller then sued for the difference between the mitigated price of $6.83 and the contract price of $13.50. The buyer's defense was grounded in section 2-613. He claimed that the soybeans the seller was trying to acquire in Parkin, Arkansas were identified to the contract, that those beans were subject to final certification and that the beans failed certification. Therefore, the buyer argued, the loss was total and the contract should be avoided.

In rejecting this defense, the *Dreyfus* court considered the circumstances surrounding the contract. It noted that the only evidence of identification was the seller's statement of where he planned to acquire

64. 501 F. Supp. 1169 (E.D. Ark. 1980).

65. The parties will be referred to as buyer and seller rather than plaintiff and defendant or grain dealer and farmer. This is to avoid confusion. Normally, in these cases, the buyer is suing to enforce the contract instead of being sued to perform. Also, the seller is typically a farmer being sued for performance rather than a grain dealer.

the beans. The court also noted that soybeans, even certified Arkansas Bragg soybeans, are a fungible commodity and it is highly unlikely that a buyer would be concerned about where the soybeans were acquired as long as they met quality requirements. The court refused to inject the identification of the soybeans into the contract because the parties never negotiated for such a term. The court made a final note that even if the soybeans were identified, that element should not be considered essential to the buyer's rights and liabilities under the contract.

The *Dreyfus* court came close to a proper analysis in considering section 2-613. It considered the contract in light of the circumstances and the parties intentions and did not reject the defense simply because the source of supply was not expressly specified. It is unfortunate this court did not hear the cases in which a farmer was seeking excuse such as *McNabb*[66] or *Rooker*.[67] The *Dreyfus* court still did not excuse performance, but it is not reasonable to believe that these parties, two grain dealers, intended specific soybeans to be identified to the contract. Also, a grain dealer does not care from where the grain comes as indicated by the cases where grain dealers expected delivery despite a farmer's corp failures. It is reasonable to believe that a farmer intends his crops to be the subject of a contract for the sale of the type of grain he raises with delivery scheduled during the harvest season. But even this court may not be as reasonable as it seems. The last comment in *Dreyfus* indicates that contracts for fungible goods would have to expressly specify the subject of the contract before it would be considered essential to the seller's rights and liabilities under the contract.

Several courts have excused farmers' performance under forward grain contracts. Not surprisingly, these cases are very similar in their rationale and reasoning to the cases where performance is not excused, only the results are different. Some common characteristics of cases excusing performance are (i) excuse has always been allowed under the guise of 2-615 but not 2-613, (ii) parol or extrinsic evidence is always admitted, and (iii) the grain that is the subject of the contract must have been found to be identified to crops growing on the farmers land. *Low's Ezy-Fry Potato Co. v. J.A. Wood Co.*[68] was one of the first reported cases to cite U.C.C. 2-615 in excusing a farmer's performance. In *Low's*, pursuant to a contract dated March 16, 1965, the plaintiff, a consumer of potatoes, agreed to buy and defendant, a farming corpora-

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66. Ralston Purina Co. v. McNabb, 381 F.Supp. 181 (W.D. Tenn. 1974).
67. Ralston Purina Co. v. Rooker, 346 So. 2d 901 (Miss. 1977).
68. 26 Agric. Dec. 583 (1967).

tion, agreed to sell eight loads of "three inch minimum" Kennebac potatoes.[69] The farmer's harvest yielded no potatoes that could meet the three inch minimum.[70] The plaintiff filed a reparation proceeding under the Perishable Agricultural Commodities Act 1930, as amended (7 U.S.C. section 499a et seq.).

The judicial officer of the U.S. Department of Agriculture accepted the defendant's contention that the contract was limited to crop production from defendant's land. The judicial officer found that the parties contemplated the sale from a particular tract of land and held that the contract was subject to an implied condition in this regard absent an express provision to the contrary. This rationale is based more upon common law doctrine than it is on the provision of section 2-615.[71] Imposing an implied condition that the farmer's crops are identified in this type of contract is more generous than sections 2-613 and 2-615 which only seek to determine the intent of the parties and the purpose of the contract. Analyzing and explaining the decision in terms of impracticability of performance, basic assumptions of the parties and assumptions of the risk of not growing any three inch minimum potatoes would have resulted in a more well-reasoned opinion.

The Mississippi Supreme Court excused a farmer's performance twice during the mid-1970's in *Dunavant Enterprises, Inc. v. Ford*[72] and *Paymaster Oil Mill Co. v. Mitchell.*[73] In *Dunavant*, a cotton merchant approached the defendant-farmer while he was in the hospital to buy his cotton crop for the year 1971. The defendant advised the merchant that he intended to plant 1800 or 1900 acres of cotton but that he could not contract to sell cotton grown on approximately 350 acres of crop share leased land. The merchant asked the plaintiff-grain dealer if he wanted to buy approximately 1,600 acres of cotton to be grown by the defendant. The plaintiff agreed and drafted a contract which called for the sale of "all and only the cotton produced by Seller during the crop year 1971 on approximately 1,600 acres situated in

69. By describing the goods in such a manner as to become the basis of the bargain, the farmer may have created and breached an express warranty that the goods shall conform to the description. *See* U.C.C. § 2-313 (1987). However, further discussion of this issue is outside the scope of this paper.

70. The opinion did not state the reason the harvest failed to yield any "3 inch minimum" Kennebac potatoes. It only states that it was through no fault of the farmer.

71. U.C.C. Reporting Service Editors' Note states: "The opinion cites the U.C.C. However, it should be noted that the Arizona Code does not become effective until December 31, 1967."

72. 294 So.2d 788 (Miss. 1974).

73. 319 So. 2d 652 (Miss. 1975).

Mark's, Miss."[74] When the cotton merchant delivered the contract to the defendant, who was still in the hospital, the defendant stated that he did not know whether he could plant a full 1,600 acres on his own land. The cotton merchant assured him that it did not make any difference and the defendant signed the contract. Due to cold weather and eight or nine inches of rain during the planting season, the defendant was only able to plant 1,250 acres of his own land. The plaintiff sued for damages for breach of contract claiming the contract included the 550 bales of cotton that were produced on crop share land planted by the defendant. First, the *Dunavant* court affirmed the trial court's admission of parol evidence that was instrumental in finding that the crop share leased land was not included in the contract. Next, comment 9 of section 2-615 was cited without elaboration.[75] The court then established the rule that when a farmer's crops are identified to a forward grain contract and subsequently destroyed, the farmer's performance is excused as an implied condition of that contract absent express conditions in the contract to the contrary. The reason given for this rule is that both parties are well aware of the possibility of local crop failure.

In *Paymaster*, the defendant-farmer agreed to deliver and the plaintiff-grain dealer agreed to buy 4000 bushels of soybeans at $3.11 per bushel with delivery to be made in October and November, 1972. On July 19, 1972, a written confirmation of the agreement was executed which contained the following language: "We confirm the purchase from you, as per our conversation Dennis Mitchell/Benny Franklin . . . ."[76] A severe and unusual drought greatly damaged the defendant's soybean crop. The defendant delivered his entire crop of 1835 bushels to the plaintiff leaving the contract short by 2,165 bushels.

The plaintiff sued for breach of contract because of this underdelivery. The trial court directed a verdict for defendant after hearing evidence concerning the contract. The plaintiff appealed claiming the court erred in admitting testimony in violation of the parol evidence rule.

The *Paymaster* court held that parol evidence was properly admitted stating that the written confirmation was not the entire contract between the parties since the conversation of Mitchell and Franklin was incorporated into it. The court cited the *Dunavant* rule that if a

74. *Dunavent*, 294 So.2d at 789.

75. *See supra* notes 28-30 and accompanying text.

76. *Paymaster*, 319 So. 2d at 654.

farmer's crops are identified in a forward grain contract, the farmer's performance is excused as an implied condition of the contract absent an express condition in the contract to the contrary.

In *Dunavant*,[77] *Paymaster*[78] and *Rooker*,[79] the Mississippi Supreme Court established its method of analysis for forward grain contract cases. The parol evidence rule is utilized to determine whether the farmer's crops are identified to the contract. If the crops are not identified, performance under the contract is not excused. If the crops are identified to the contract, the court utilizes section 2-615 to hold that performance is excused as an implied condition of the contract.

While this approach considers evidence of the parties' intent and of other circumstances surrounding the contract, it still does not conform to the plain language of sections 2-613 and 2-615. The Mississippi Court's analysis fits well with the requirements of section 2-613. Identification of the farmer's crops to the contract is the key requirement of section 2-613 in the context of forward grain contracts. Once it is satisfied, the facts of forward grain contract cases automatically satisfy the remaining requirements. Thus, after identification, section 2-613 does imply excused performance as a condition of the contract. The problem is that the Mississippi Supreme Court is using this analysis under the guise of section 2-615. If the requirements of section 2-615 were analyzed and explained, it would at least result in more cogent opinions and perhaps would have changed the decision.

Two final cases that excused a farmer's performance construed printed forms provided by the grain dealer in a light most favorable to the farmer. Thus, parol evidence was admitted to identify the contracted grain as crops grown on the farmer's land.

In *Campbell v. Hostetler Farms, Inc.*,[80] a farmer and a grain dealer entered two forward grain contracts. One was for the sale and purchase of 3,000 bushels of No. 2 wheat at $2.15 per bushel, delivery to be made in June and July of that year. The other was for the sale and purchase of 20,000 bushels of No. 2 yellow corn at $1.70 per bushel, delivery to be made in October and November of that year. The parties agreed that only 1,535 bushels of wheat and 10,418 bushels of corn were delivered leaving an undelivered balance of 1,465 bushels of wheat and 9,582 bushels of corn. The farmer contended he was excused from further performance under the contracts because an unduly wet

77. Dunavant Enterprises, Inc. v. Ford, 294 So. 2d 788 (Miss. 1974).
78. Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652 (Miss 1975).
79. Ralston Purina Co. v. Rooker, 346 So. 2d 901 (Miss. 1977).
80. 380 A.2d 463 (Pa. 1977).

season had resulted in a partial failure of his wheat crop and inability to plant his normal acreage of corn. The grain dealer contended the farmer's contractual obligation was to fully perform the contracts without regard to the source from which the products were obtained. The contract was drafted on a pre-printed form supplied by the grain dealer that contained a clause which stated: "We do not accept liability, save for our own negligence, if commodity does not arrive according to billing instructions. We do not accept liability for shipping delays on account of strikes, embargoes, car shortages or other conditions beyond our control."

At trial, the farmer was allowed to introduce testimony concerning negotiations of the contract. The jury decided that the farmer was excused from further performance. The grain dealer appealed the introduction of parol evidence because the contracts were intended as the final expression of the parties agreement.

The *Campbell* court stated that the clause disclaiming liability was meant to benefit the seller because the conditions disclaimed relate to acts of a seller. The court made this statement despite the fact that the term was in the buyer's pre-printed form. However, the court did not base its decision on this finding. The majority of the court affirmed the jury's finding that parol evidence should be admitted to identify the contract to the farmer's land, thereby excusing performance.[81]

This court had a built-in contract clause disclaiming the farmer's liability on which to excuse performance without referring to sections 2-613 and 2-615. Even without the clause, it could have analyzed the contract in light of the requirements of sections 2-613 and 2-615 and held that the intent of the parties and the purpose of the contract required excused performance. Instead, the court held the parol evidence rule inapplicable and admitted evidence to identify the farmer's crops to the contract.

In *Michigan Bean v. Senn*,[82] the contract required the defendant-farmer to deliver to the plaintiff-dealer 90,000 pounds net weight of CHP grade navy beans at the price of $9 per cwt. each year for a three-year period commencing in 1972, said deliveries to be made on or

81. Three justices concurred in the result because the grain dealer never raised the argument that the contract was a complete and exclusive statement of the terms of the agreement and because there was ample evidence to support the jury finding. They noted that the grain dealer was correct in asserting that it was for "the court" to decide whether written terms should be supplanted by parol evidence rather than for the jury as per the clear language of U.C.C. § 2-202(b) (1987). *See supra* note 48.

82. 293 Mich. App. 440, 287 N.W.2d 257 (1979).

before October 31 of each year. The 1973 contract volume was subsequently amended to 150,000 pounds. Early in September, 1973, the defendant notified the plaintiff of his inability to deliver the full contract volume. The defendant delivered less than 40,000 pounds out of the 150,000 annual volume due to abnormally extreme weather conditions.[83]

The plaintiff sued for breach of contract for failure to deliver the balance on the contract. The defendant contended his performance was excused under section 2-615. At trial, the court rejected the defendant's introduction of parol evidence and his defense of excuse. The *Michigan Bean* court reversed the trial court for refusing to allow the introduction of parol evidence.[84] The court noted that if parol evidence identified the farmer's crops to the contract, performance could be excused under the provisions of section 2-615.

Thus, in *Michigan Bean,* the parol evidence rule was again relied upon to determine the intent of the parties. The applicability of section 2-615 was made dependent thereon. The *Michigan Bean* court did not have to address the applicability of sections 2-613 and 2-615 since the trial court was reversed for their incorrect application of the parol evidence rule. However, had the court analyzed the admitted parol evidence within the requirements of section 2-615, it might have determined that performance was impracticable, that a basic assumption of the contract was delivery of the farmer's navy bean crop and that the farmer had not guaranteed delivery regardless of his crop. The court might have remanded the case with instructions to excuse the farmer's performance.

A synopsis of the cases previously discussed shows that some courts strictly construe contracts calling for delivery of "grain." Thus, the farmer's crops are not "identified" to the contract and sections 2-613 and 2-615 are held inapplicable. On the other hand, courts have subjected the applicability of sections 2-613 and 2-615 to the parol evidence rule, section 2-202. None of the courts, however, analyzed the requirements, provisions and rationale of sections 2-613 and 2-615 in

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83. The opinion did not specify the exact nature of these weather conditions.

84. The trial court refused to allow parol evidence because the contract was not ambiguous. In reversing the trial court, the *Michigan Bean* court cited the official comments to § 2-202 by the commissioners on Uniform State Laws which states:

> 1. This section definitely rejects:
>
> * * *
>
> (c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.

applying them to forward grain contract cases.

AUTHOR'S ANALYSIS

When confronted with the issue of whether performance should be excused under a forward grain contract, a court should utilize the requirements of and the rationale behind sections 2-613 and 2-615 to reach its decision. The analysis of sections 2-613 and 2-615 developed previously in this paper,[85] suggests logical arguments that the provisions of either section can and should be applied. However, as noted in the cases discussed above, the courts have not examined the facts of the case in light of the requirements of sections 2-613 and 2-615.

Courts have applied the parol evidence doctrine, thereby strictly construing the written terms of contracts for "grain" or "crops" as fungible goods contracts that should be performed regardless of the status of the farmer's crops. Thus, the applicability of sections 2-613 and 2-615 is severely restricted. Conversely, courts have admitted parol evidence and found that the farmer's crops are "identified" to the contract, the farmer's performance is excused as an implied condition of the contract or of section 2-615. Thus, sections 2-613 and 2-615 are basically superfluous to the court's decision. Regardless of the outcome, the courts have, in essence, neutered these sections.

In substantially all forward grain contract cases, the parol evidence doctrine is not applicable. These contracts are between farmers and grain dealers who are both well aware of the possibility that the farmer's crops will not be harvested due to acts of God or other contingencies. Therefore, a forward grain contract between such parties is not intended as a final expression of the terms of their agreement unless the contract specifies the obligation of each party when the farmer's crops can not be harvested. Litigated forward grain contracts do not specify such obligations. Therefore, evidence of course of dealing, of usage of trade, of course of performance and of consistent additional terms should be admitted to explain and supplement the contract pursuant to U.C.C. section 2-202.[86]

Once the court has recognized that the parol evidence doctrine will not usurp sections 2-613 and 2-615, it is not a foregone conclusion (or an implied condition) that performance will be excused. Under section 2-613, the key requirement is that the party seeking excuse must show that the farmer's crops are identified to the contract. Under section 2-

85. *See supra* notes 4-43 and accompanying text.
86. *Supra* note 48.

615, the party seeking excuse must show that the three requirements of section 2-615 are met. One, that the farmer has not assumed the risk of performing the contract despite the inability to harvest the farmer's crops; two, that inability to harvest the farmer's crops has made performance impracticable; three, that nonoccurrence of the inability to harvest the farmer's crops (the ability to harvest the farmer's crops) was a basic assumption on which the contract was made.

In determining whether the farmer's crops are identified to the contract under section 2-613, the court can perceive section 2-613 as a codification of the common law doctrine of impossibility. Seemingly, such a perception is shared by prominent commentators.[87] Because of the difficulty in identifying particular lots or groups of fungible goods to a contract, the availability of excuse will be limited. Alternatively, the court can perceive section 2-613 as a codification of commercial impracticability. This position is espoused by the Restatement (Second) of Contracts and by the Comments to section 2-613.[88] The intent of parties will be the determining factor in deciding if the farmer's crops have been identified to the contract and thus making it commercially impracticable.

Many factors should be considered by the court in determining the applicability of section 2-613 including the previous dealings of the parties, the trade practices in the areas, and the commercial effect of excusing (e.g., does the farmer have crop insurance, can the grain dealer compensate for the loss of the contract, etc.). The court should weigh and balance these competing factors to reach its decision.

The court should not be persuaded by the argument that by its terms section 2-613 will only operate to relieve the buyer from his or her obligation.[89] Comments to sections 2-613 and 2-615 establish its applicability to both parties to the contract.

In determining the applicability of 2-615 to excuse performance, the court is not at liberty to determine the standard to apply. Section 2-615 specifically refers to impracticability and not impossibility of performance. It also requires that the basic assumptions of the contract be determined. The perceived disparities between the comments and the text of section 2-615 concerning its applicability to forward grain contracts should be disregarded. The National Conference of Commissioners on Uniform State Laws has decided to include forward grain con-

87. *See supra* notes 11-24 and accompanying text.

88. *See supra* notes 5-7 and accompanying text.

89. For a discussion *see* Comment, *Crop Failures and §§ 2-615 of the Uniform Commercial Code*, 22 S.D.L. REV. 529, 533 (1977).

tracts as a specific illustration of when sections 2-613 an 2-615 should operate. Such deference by the Commissioners should not be obscured by questioning the true intent of their comments.

The court should consider many extrinsic factors in applying section 2-615 including previous dealings of the parties, trade practices in the area, as well as the five circumstances proposed by the Restatement (Second) of Contracts.[90] Such considerations will insure that the farmer is not unjustly saddled with the double loss of his crop plus liability for the contract, that the grain dealer does not lose a source of supply for which the dealer can not make up and that the burden for this unfortunate loss will be properly dispersed within the marketing chain.

CONCLUSION

Avoidance of this entire issue would be a simple matter of including a term in the forward grain contract concerning obligations if the farmer's crops are destroyed. Both parties to the contract should know to include such a term. Forward grain contracts, however, will continue to be written without such terms and courts will continue to be faced with the issue of whether to excuse performance. When such issues arise, sections 2-613 and 2-615 should be thoroughly explained and analyzed in order for a cogent and well-reasoned decision to result.

90. *See supra* notes 40-43 and accompanying text.